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Benjamin J. Clark

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AMERICA'S EVOLVING STANCE ON MENTAL RETARDATION AND THE DEATH PENALTY

*Benjamin J. Clark**

INTRODUCTION

In 1989, the United States Supreme Court refused to issue a categorical Eighth Amendment ban on the execution of mentally retarded defendants in *Penry v. Lynaugh*.¹ The Court then reversed this decision in its 2002 decision in *Atkins v. Virginia*. The Court found that the country's standards of decency had evolved to such an extent that the death penalty should not be available for mentally retarded defendants.² This paper will examine these cases and the social evolution that occurred after *Penry*, which spawned the legislative work products, sentencing jury determinations, and the other criterion that the Court found persuasive to issue such a categorical ban, a mere 13 years after initially declining such a decision. It will then examine Justice Scalia's blistering dissent in *Atkins*, and defend the majority's ruling from his arguments. Then this paper will show how, in these cases, the Court changed the way it brought "its own judgment to bear by asking whether there is reason to agree or disagree with the judgment reached by the citizenry and its legislators."³ And, by examining Florida's prohibition on the execution of mentally retarded defendants, this paper will focus on one of the influential state statutes that contributed to the *Atkins* decision. Finally, this paper will explore the legal definition of "mentally retarded."

* B.A., Indiana University, J.D., DePaul College of Law, May 2003.

¹ *Penry v. Lynaugh*, 492 U.S. 302, 329, 340 (1989).

² *Atkins v. Virginia*, 536 U.S. 304, 304-05 (2002).

³ *Id.*

A COMPARISON OF THE RELEVANT CASES: *PENRY AND ATKINS*

Penry v. Lynaugh, 492 U.S. 302 (1989)

In 1979, a Texas woman was brutally raped and murdered by Johnny Paul Penry,⁴ a man with a substantially below average IQ estimated to be 54.⁵ At Penry's competency hearing, a clinical psychologist testified that the defendant had the mental capacity of a 6 ½ year old and the social maturity of a 9 or 10 year old, "which indicates mild to moderate mental retardation."⁶ Nevertheless, he was found to be mentally competent to stand trial.⁷ At trial in 1986, "[t]he jury rejected Penry's insanity defense, convicted him of capital murder and sentenced him to death."⁸ He subsequently appealed.

In 1988⁹, the Supreme Court granted certiorari and considered for the first time the issue of whether the Eighth Amendment categorically prohibits the execution of mentally retarded defendants.¹⁰

The Penry 2-part test

The *Penry* Court looked at and questioned the execution of mentally retarded people using two different standards to determine whether it would be considered cruel and unusual, and therefore, prohibited by the

⁴CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS, 273 (Randall Coye & Lyn Entzerorth eds., 2d ed. 2001) Editor's note stating: Johnny Paul Penry's mental problems started at birth. A difficult breach delivery left Penry with organic brain damage. His condition was aggravated during early childhood by his mother's brutal beatings. She struck Penry on the head, broke his arm several times, burned him with cigarette butts, and forced him to eat his own feces and drink urine. Penry's neighbors recalled hearing 'terrible, terrible screams' coming from the Penry house every afternoon. Penry dropped out of the first grade and when he reached adulthood his mental age was still comparable to the average second-grader's. As an adolescent, Penry was unable to recite the alphabet and could not count.

At age 21, Penry was convicted of rape and was eventually was paroled. A report from the Texas Rehabilitation Commission warned that he had 'very poor coordination between body drives and intellectual control. He also tends to be very defensive and may tend to protect himself from anticipation of hurt from others through aggressive acts.'

During Penry's trial ... 'it became clear [that Penry] couldn't read or write ... He couldn't say how many nickels were in a dime or name the President of the United States.'

⁵*Penry*, 492 U.S. at 308.

⁶*Id.* at 307-08.

⁷*Id.*

⁸*Id.* at 310.

⁹*Id.* at 312-13. The Supreme Court actually denied certiorari on direct review in 1986. Penry then filed this habeas corpus petition challenging the death sentence by arguing his Eighth Amendment rights were violated by unsatisfactory jury instructions. The District Court denied relief, as did the Court of Appeals. The Supreme Court then granted certiorari in 1988 to decide, among other issues, whether it is "cruel and unusual punishment under the Eighth Amendment to execute a mentally retarded person with Penry's reasoning ability."

¹⁰*Penry*, 492 U.S. at 313.

Eighth Amendment.¹¹ First, it looked to determine whether such punishment was considered cruel and unusual at the time of the adoption of the Bill of Rights.¹² If the evidence was insufficient under the first standard, the punishment could still be considered cruel and unusual by the Court under the second standard, if it violated the “evolving standards of decency that mark the progress of a maturing society.”¹³

When it examined the first standard, the Court, taking into consideration cruel and unusual punishment at the time of the adoption of the Bill of Rights, acknowledged that there had been common law bans on the punishment of “idiots” and “lunatics.”¹⁴ However, the majority noted that these terms were synonymous with modern definitions of insanity and only the most severe cases of mental retardation.¹⁵ This standard did not help Penry who was found to have a “rational as well as factual understanding of the proceedings against him,” and thus, was found competent to stand trial.¹⁶ Because he was considered capable of understanding the consequences of his actions, he did not fall amongst the class of persons who may have been protected from execution because they were considered “idiots” or “lunatics” at common law.¹⁷ Nevertheless, the Court found Penry to be mildly mentally retarded, and declared that there was a lack of evidence showing that the practice of executing a person of mild or moderate retardation would be considered cruel and unusual at the time of the adoption of the Bill of Rights.¹⁸

Despite the fact that the Court did not consider this punishment cruel and unusual at the time of the adoption of the Bill of Rights, the Court could still find the punishment to be unconstitutionally excessive if the nation’s “evolving standards of decency that mark the progress of a maturing society.”¹⁹ Under the second standard, the Court looked first and foremost at legislative work product for evidence of such standards of decency, and then to “data concerning the actions of sentencing

¹¹*Id.* at 330-31.

¹²*Id.* at 330.

¹³*Id.* (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion); *Ford v. Wainwright*, 477 U.S. 399, 406 (1986)).

¹⁴*Id.* at 333.

¹⁵*Penry*, 492 U.S. at 333.

¹⁶*Id.* at 333 citing *Dusky v. United States*, 362 U.S. 402 (1960).

¹⁷*Id.*

¹⁸*Id.* at 334-345.

¹⁹*Id.* at 330-31 quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion); *Ford*, 477 U.S. at 406.

juries.”²⁰ Accordingly, the *Penry* Court found that there was insufficient evidence to show that the execution of a mildly mentally retarded person, such as Penry, would violate the country’s evolving standards of decency at that time.²¹ The Court found that there was insufficient evidence to support Penry’s claim that “there [was] an emerging national consensus against executing the mentally retarded,” and noted that only one state had banned the execution of mentally retarded defendants, aside from the fourteen states that had completely banned the practice of capital punishment.²² Further, it found the evidence insufficient to support the contention that the country’s standards of decency categorically rejected such executions.²³ Thus, the Court’s application of the second standard did not help Penry’s plight either.

However, the *Penry* Court left open the possibility of a reversal of its decision if empirical evidence of such a national consensus were to arise. After noting that valid public opinion polls showed that a sizeable majority of citizens from states that allowed the death penalty were opposed to the execution of mentally retarded offenders, the Court concluded, “[b]ut *at present*, there is insufficient evidence of a national consensus against executing mentally retarded people.”²⁴ This language suggests it may be appropriate to review this issue again in the future, if evidence of a national consensus against this penalty emerges.

²⁰ *Penry*, 492 U.S. at 331 *citing* *Enmund v. Florida*, 458 U.S. 782, 794-96 (1982); *Thompson v. Oklahoma*, 487 U.S. 815, 831 (1988) (plurality opinion).

²¹ *Id.* at 335.

²² *Id.* at 333-34.

²³ *Id.* at 334-35. As a basis for comparison, the Court noted that *Ford v. Wainwright*, which held the Eighth Amendment bans the execution of the insane, had considerably more evidence of a national consensus against such punishment as no state allowed the execution of the insane and 26 states had explicit statutory bans on such punishment. *Id.* at 334 *citing Ford*, 477 U.S. at 408.

²⁴ *Penry*, 492 U.S. at 335 (emphasis added).

Atkins v. Virginia, 492 U.S. 304 (2002)

In 2002, the Supreme Court revisited this issue in the case of *Atkins v. Virginia*.²⁵ In light of new evidence of an emerging national trend against allowing the execution of mentally retarded defendants, the *Atkins* Court held that it would be considered cruel and unusual punishment, and would be prohibited under the Eighth Amendment.²⁶

The *Atkins* Court applied the *Penry* test, and looked to statutes for piecemeal evidence of a national consensus, which had held such punishment to be excessive.²⁷ In contrast to the *Penry* Court, and perhaps in response to the *Penry* decision, the *Atkins* Court found a significant number of state legislatures that no longer administered capital punishment to the mentally retarded.²⁸ In its decision, the Court noted that after *Penry*, every legislature that addressed the issue had voted overwhelmingly in favor of the prohibition.²⁹ Accordingly, the Court observed, “[i]t is not so much the number of these States that is significant, but the consistency of the direction of change.”³⁰

In addition, the Court found that even in states that allowed execution of mentally retarded persons, the practice was not commonly imposed by juries.³¹ For example, in New Hampshire, capital punishment was available for mentally retarded offenders, but it had not been imposed in decades.³² Moreover, since *Penry*, only five states had executed offenders with a known IQ of less than 70.³³ The Court found the juries’ reluctance to impose the death penalty upon the mentally retarded to be significant evidence of the public’s aversion to the practice, and concluded that “[t]he practice, therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it.”³⁴ This movement was perceived by the Court as a national declaration that the mentally retarded were less culpable than

²⁵ *Atkins*, 536 U.S. at 304.

²⁶ *Id.* at 311-21.

²⁷ *Id.*

²⁸ *Id.* at 314-16. The Court noted the work product of 21 state legislatures that banned the practice of executing the mentally retarded. Georgia and Maryland were the first states to statutorily prohibit such punishment, and Congress enacted a similar ban for the federal death penalty. *Id.* “In 1990, Kentucky and Tennessee enacted statutes similar to those in Georgia and Maryland, as did New Mexico in 1991 and Arkansas, Colorado, Washington, Indiana, and Kansas in 1993 and 1994. In 1995, when New York reinstated its death penalty, it emulated the Federal Government by expressly exempting the mentally retarded.” *Id.* at 314.

²⁹ *Atkins*, 536 U.S. at 316.

³⁰ *Id.* at 315.

³¹ *Id.* at 316.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

the average criminal, and that they should not be executed.³⁵ Accordingly, the *Atkins* Court categorically banned the practice of executing the mentally retarded.

Excessive because of a lack of retribution and deterrence

The Court in *Atkins* held that retribution and deterrence, the two principle societal functions that the death penalty is supposed to achieve, are undermined when applied to the mentally retarded.³⁶ In assessing the function of retribution, the Court noted that "the severity of the appropriate punishment necessarily depends on the culpability of the offender."³⁷ When applied to a mentally retarded defendant, the Court reasoned that the function of retribution is considerably broken down and the punishment will be excessive because the defendant's culpability is diminished.³⁸ A punishment is excessive and prohibited by the Eighth Amendment "if it is not graduated and apportioned to the offense."³⁹ Taking into consideration the reduced ability of mentally retarded defendants to form the most heightened criminal intent, the Court held that the imposition of the death penalty to mentally retarded defendants would be excessive because the offense is not committed with the premeditation and deliberation that justifies putting them to death.⁴⁰

Additionally, the intended purpose of deterrence is also hindered when the death penalty is administered to the mentally retarded, because inherent in mental retardation is the inability to learn from experience, reason logically, and control impulses.⁴¹ In view of that, the Court in *Atkins* found that mentally retarded people generally do not fully understand that their actions may cause the imposition of punishments such as imprisonment or execution.⁴² Without an understanding of those basic concepts of punishment, a mentally retarded person cannot understand the possibility of being executed⁴³ so it does not effectively deter them from committing criminal acts.

The *Atkins* Court found this wave of negative reaction toward the execution of mentally retarded defendants to be evidence of the

³⁵ *Akins*, 536 U.S. at 318.

³⁶ *Id.* at 318-19.

³⁷ *Id.* at 319.

³⁸ *Id.*

³⁹ *Weems v. United States*, 217 U.S. 349, 367 (1910).

⁴⁰ *Atkins*, 536 U.S. at 319.

⁴¹ *Id.* at 320.

⁴² *Id.*

⁴³ *Id.*

country's prevailing standards of decency.⁴⁴ It held that "such punishment is excessive and that the Constitution 'places a substantive restriction on the state's power to take the life' of a mentally retarded offender," and therefore, categorically banned the application of the death penalty to mentally retarded defendants.⁴⁵

In Defense of the Majority from Justice Scalia's Dissent

Justice Antonin Scalia dissented from the majority's decision to categorically ban the imposition of capital punishment upon mentally retarded defendants.⁴⁶ He argued that the mentally retarded have no diminished personal culpability, and that the societal functions of deterrence and retribution are not substantially diminished when the death penalty is applied to this class of individuals.⁴⁷ The decision of whether to execute any defendant properly resides with juries, argued Scalia, and the majority's decision effectively usurps their role.⁴⁸ Further, he contended that there was a lack of conclusive evidence to show the existence of a national consensus in opposition of the execution of the mentally retarded. In addition, he rejected the majority's finding that mentally retarded defendants frequently lack the ability to effectively participate in the criminal justice system.⁴⁹ This section will respond to each of Scalia's arguments, and will defend the majority's holding that the mentally retarded should be shielded from the application of the death penalty.

Disadvantages of the mentally retarded throughout the criminal justice system

The first response will be to Justice Scalia's argument that the mentally retarded are able to effectively participate in the criminal justice system and therefore should not be given special treatment.⁵⁰ This argument is flawed because Scalia fails to consider that the mentally retarded have inherent disadvantages throughout all phases of the trial, which start as

⁴⁴*Id.* at 405.

⁴⁵ *Atkins*, 536 U.S. at 321, *quoting Ford*, 477 U.S. at 405.

⁴⁶ *Atkins* was decided by a judicial line-up of 6-3. The majority opinion was written by Justice Stevens. Chief Justice Rehnquist dissented and filed an opinion in which Justice Scalia and Thomas joined. Justice Scalia dissented and filed an opinion in which Chief Rehnquist and Thomas joined.

⁴⁷ *Atkins*, 536 U.S. at 350-52 (Scalia, J. dissenting).

⁴⁸ *See id.* at 221, *quoting* 1 Pleas of the Crown, at 32-33.

⁴⁹ *Id.* at 342-348.

⁵⁰ *Id.*

early as the police investigation.⁵¹ The mentally retarded are generally very responsive to coercion, and may be easily agitated when detained, even if they have done nothing wrong.⁵² This responsiveness may account for suspicious behavior of the mentally retarded suspect, and may also cause him to falsely confess.⁵³ “Because of his impaired thought process, the suspect erroneously accepts guilt, assuming that the police officer’s allegation presupposes his responsibility in perpetuating the crime. Therefore, he confesses to a crime he did not commit, thereby ‘corroborating’ the police officer’s belief in his culpability.”⁵⁴ Additionally, the mentally retarded are less likely to understand their Miranda rights, “but because of the inclination to answer questions in affirmatively, [the mentally retarded defendant] will often say that he understands the Miranda rights,” even when he does not.⁵⁵ Mental retardation may therefore hinder the effect of the defendant’s Miranda warnings, depriving him of a necessary legal safeguard designed to protect him from administering incriminating confessions. Mentally retarded people are among the most vulnerable class of persons, despite Justice Scalia’s opinion, so it is proper to afford them protection considering the enormous impact confessions usually have at trial.

The mentally retarded defendant may also have difficulty building a proper defense due to a very poor memory, which is a common component of mental retardation.⁵⁶ “This impediment, coupled with the tendency to fall prey to others’ suggestions, renders communication of the facts, especially the most mitigating facts, to the defense lawyer next to impossible.”⁵⁷

And at trial, the mentally retarded defendant frequently and unavoidably acts in ways that seem highly inappropriate for the

⁵¹Joseph A. Nese, Jr., *The Fate of Mentally Retarded Criminals: An Examination of the Propriety of Their Execution Under the Eighth Amendment*, 40 DUQ. L. REV. 373, 380-81 (2002).

⁵²*Id.* at 381 (2002).

⁵³*Id.*

⁵⁴*Id.* (citing ROSA ENRENREICH & JAMIE FELLNER, BEYOND REASON: THE DEATH PENALTY AND OFFENDERS WITH MENTAL RETARDATION, 13 HUM. RTS. WATCH NO. 1(G), 24 (Malcolm Smart & Cynthia Brown eds., 2001), available at <http://www.hrw.org/reports98/pbsjanjun2k1.htm>).

⁵⁵*Id.* at 382.

⁵⁶*Id.* at 383.

⁵⁷Nese, *supra* note 43, at 383, citing Texas Defender Service, A State of Denial: Texas Justice and the Death Penalty, at <http://justice.policy.net/cjreform/studies/texasdefenders/chapter5.vtml#N71> (last visited Jul. 28, 2001).

situation.⁵⁸ For example, he might sleep, smile, or become restless at points in the trial that seem totally inappropriate to the average person.⁵⁹ Juries might see this and misinterpret this behavior for a lack of remorse or compassion for the victim.⁶⁰ To compound this problem, “[f]ew lawyers have received special training in communicating with a mentally challenged client, and many lawyers do not want to spend the time explaining the different stages of a case in unsophisticated language, appropriately simplified for their clients to comprehend.”⁶¹

Diminished personal culpability

In refuting the majority’s contention that the deficiencies of mentally retarded people “do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability,”⁶² Scalia charged that “[o]nce the Court admits (as it does) that mental retardation does not render the offender morally *blameless* there is no basis for saying that the death penalty is *never* appropriate retribution.”⁶³

However, since *Gregg v. Georgia*, the Court has referred to the death penalty as an “extreme sanction”⁶⁴ that should be confined to a “narrow category of the most serious crimes.”⁶⁵ The *Gregg* Court stated that “a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance” is necessary to ensure that the death penalty is “not be[ing] imposed in an arbitrary or capricious manner.”⁶⁶ Inherent in this statement is the suggestion that the States’ statutes governing the death penalty must shield the public from an arbitrary and capricious application by narrowly tailoring these statutes in a way that protects society’s weakest and most defenseless classes. There are few, if any, classes of people that can be categorized as more vulnerable than the mentally retarded. Arguably, they are more easily manipulated and exploited than any other class of defendants, and as such it is imperative that they receive protection from arbitrary and capricious applications of the death penalty. Therefore, despite Scalia’s dissent, the Court’s decision in *Gregg*

⁵⁸*Id.*

⁵⁹*Id.*

⁶⁰*Id.*

⁶¹*Id.* citing Texas Defender Service, *A State of Denial: Texas Justice and the Death Penalty*, at <http://justice.policy.net/cjreform/studies/texasdefenders/chapter5.vtml#N71> (last visited Jul. 28, 2001).

⁶²*Atkins*, 536 U.S. at 350-52. at 318 (Scalia, J. dissenting).

⁶³*Id.* at 351 (Scalia, J. dissenting) (internal citations omitted).

⁶⁴*Gregg v. Georgia*, 428 U.S. 153, 187 (1976).

⁶⁵*Atkins*, 536 U.S. at 319.

⁶⁶*Gregg*, 428 U.S. at 188-95.

shows that such extreme sanctions should not be applied to such vulnerable groups of defendants.

Another argument Justice Scalia made against the majority's assertion was that the diminished mental capacities of mentally retarded offenders make them categorically less culpable. He asserted:

I am not sure that a murderer is somehow less blameworthy if (though he knew his act was wrong) he did not fully appreciate that he could die for it; but if so, we should treat a mentally retarded murderer the way we treat an offender who may be 'less likely' to respond to the death penalty because he was abused as a child. We do not hold him immune from capital punishment, but require his background to be considered by the sentencer as a mitigating factor.⁶⁷

This argument is callous and deeply insensitive to the difficulties of mentally retarded persons. It ignores the complicated mental difficulties they experience in comparison to the rest of society. Also, it neglects the premise that "[s]ince a mentally retarded person is of lower intelligence and has reduced ability in language, ability to control impulsively, self-concept, self-perception, moral development, knowledge of basic facts, and motivation, it is unlikely that such an individual could possess the requisite *mens rea* to be found guilty of murder."⁶⁸ Ultimately, this position shows that Scalia lacks compassion; he leaves out any human component in his reasoning for a decision that has everything to do human fragility.

Deterrence and retribution

In his dissent, Justice Scalia also rejects the majority's claim that the social function of retribution is significantly diminished when applied to the mentally retarded due to their reduced culpability.⁶⁹ He then ridicules the majority's stance that deterrence, the other primary societal function of the death penalty, also fails due to the defendant's inability to learn from experience and think logically.⁷⁰ In support of

⁶⁷*Id.* at 352, citing *Eddings v. Oklahoma*, 455 U.S. 104, 113-17 (1982).

⁶⁸Lindsay Raphael, *Have American Standards of Decency Evolved to the Point Where Capital Punishment Inflicted upon the Mentally Retarded Can No Longer Be Tolerated?* 26 NOVA L. REV. 269, 284-85 (2001) ("For a defendant to be sentenced to death, the sentencer, at a minimum, must conclude that either the defendant intended to kill the victim and knew that there was a possibility that the victim could die, or was reckless and acted without excuse.").

⁶⁹*Atkins*, 536 U.S. at 351.

⁷⁰*Id.* at 351.

his position, Scalia stated, “even the Court does not say that *all* mentally retarded individuals cannot ‘process the information of the possibility of execution as a penalty and...control their conduct based upon that information’; it merely asserts that they are ‘less likely’ to be able to do so.”⁷¹

However, Scalia has misapplied the Courts statement. The majority’s point is not that *all* the members of a generally weak and vulnerable class of people must be totally unable to understand the consequences of their action before the Court may act to protect the class. Given the disadvantages mentally retarded defendants may experience throughout the criminal justice system, the Court is right to protect them from unconstitutionally excessive punishments. Special steps must be taken to safeguard more vulnerable factions of the public from wrongful imposition of the death penalty. The holding of *Atkins* serves this purpose.

Proper role of juries

In his dissent, Justice Scalia then ridiculed the majority for imposing the prohibition because he said that it depicts the judges and juries as unable to fully understand mental retardation. This, he stated, “contradicts the immemorial belief, here and in England, that they play an *indispensable* role in such matters.”⁷² Such criticism seems misguided, however, as the prohibition does not dispense with the role of the jury and judge. As shown later in the discussion of the Florida prohibition, capital trials now can have two stages where the defendant may be found mentally retarded, and therefore ineligible for the death penalty. The defendant may be found mentally retarded first by the trial jury. The defendant then has a second opportunity to be found mentally retarded by the court after it is advised by court-appointed professionals.

If the jury finds that the defendant’s diminished mental capacity reduces his personal culpability, and refuses to sentence him to death, the jury’s role has not been dispensed with or neglected. But even if the jury sentences the defendant to death, and the court later evaluates the defendant and finds him to be mentally retarded, the thrust of the jury’s declaration remains intact. Despite his exoneration, the prisoner is would still be found guilty of the crime, and would be punished. Therefore, in these situations, only the death sentence is vacated, and not the finding of guilt.

⁷¹*Id.*

⁷²*Id.* at 349.

Conclusive evidence of a national consensus against the punishment

Also flawed is Justice Scalia's criticism of the majority's decision, in which he argues that there is a lack of legislative proof of a national consensus against the execution of mentally retarded offenders. He argues that only 47 percent of the states to which the issue was presented voted to prohibit, and that it would be absurd to conclude a consensus has been reached.⁷³ His analysis, however, does not portray the full picture because it fails to include all the states. While it may be true that only eighteen states have enacted legislation banning the practice, Scalia neglected to include twelve states that have completely banned capital punishment.⁷⁴ Adding these twelve states to the eighteen states that only prohibit the execution of the mentally retarded, establishes that the legislatures of thirty out of fifty states have rejected the execution of mentally retarded defendants. When considering the "national consensus," it is improper to not include all the states in the nation.⁷⁵

Furthermore, unlike Scalia, the majority did not base its decision solely upon the work product of state legislatures, but also looked to the sentencing patterns of juries and public opinion polls, for indications of a national consensus. These sources weighed strongly in favor of banning the execution of the mentally retarded.⁷⁶ Justice Scalia, however, refuted the majority's assertion in his dissent when he stated: "It is not so much the number of these states [that have enacted legislation prohibiting executing mentally retarded offenders] that is significant, but the *consistency* of the direction of change."⁷⁷ He remarked, "[b]ut in what *other* direction *could* we possibly see change?"⁷⁸

His responses to the argument are unconvincing and evasive as there are several other directions we could see change. The most obvious example is to take account of the states that have addressed the issue and voted not to prohibit executing mentally retarded defendants. That has never occurred. In fact, every legislature that has addressed the issue has voted overwhelmingly in favor of prohibiting the practice.⁷⁹ Also, no state legislature has voted to reinstate the power to

⁷³*Id.*

⁷⁴*Atkins*, 536 U.S. at 351.

⁷⁵*Id.*

⁷⁶*Penry*, 492 U.S. at 333-35.

⁷⁷*Atkins*, 536 U.S. at 344 (Scalia, J. dissenting).

⁷⁸*Penry*, 492 U.S. at 333-35.

⁷⁹*Id.* at 316.

perform such executions.⁸⁰ Another consideration is anti-crime legislation that is considerably more popular than legislation that protects defendants that are found guilty of violent crimes.⁸¹ This wave of legislation carries substantial weight.⁸²

It is clear that Justice Scalia is minimizing the fact that after *Penry*, state legislatures began to address this issue and that, given the opportunity, legislatures have unanimously declared that our society views mentally retarded persons as categorically less culpable than average criminals. Taking all relevant facts into consideration clearly presents a national consensus that finds the execution of mentally retarded offenders improper.⁸³

The Court's Own Judgment: How it Differed in Both Cases

After looking to the Eighth Amendment, the Bill of Rights at the time it was adopted, the Supreme Court may bring its own judgment to bear "by asking whether there is reason to agree or disagree with judgment reached by the citizenry and its legislators."⁸⁴ The Court exercised this option in both *Penry* and *Atkins*. But more importantly, is how the Court handled this responsibility when dealing with this issue.

In response to *Penry*'s argument that his diminished mental capacity made him incapable of acting with the degree of culpability that can justify the ultimate penalty, Justice O'Connor wrote: "I cannot conclude that all mentally retarded people of *Penry*'s ability – by virtue of their mental retardation alone, and apart from any individualized consideration of their personal responsibility – inevitably lack the cognitive, volitional, and moral capacity to act with the degree of culpability associated with the death penalty."⁸⁵ O'Connor further stated that the differences in mentally retarded people can vary greatly.⁸⁶ Consequently, she concluded that to hold that they all lack the ability to form the proper mental capacity for the administration of the death penalty would be wrong.⁸⁷

Penry's argument was also rejected because it relied heavily on "the concept of 'mental age,' and to hold that execution of any person with a mental age of seven or below would constitute cruel and unusual

⁸⁰ *Id.* at 315-16.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Penry*, 492 U.S. at 314-16.

⁸⁴ *Atkins*, 536 U.S. at 313.

⁸⁵ *Penry*, 492 U.S. at 338.

⁸⁶ *Id.*

⁸⁷ *Id.*

punishment.”⁸⁸ The theory of mental age was found to be problematic because it was imprecise and misleading.⁸⁹ And because of the defendant’s mental age, the Court declined to issue a categorical ban on the execution of mentally retarded offenders in *Penry*.⁹⁰

Interestingly, in *Atkins*, O’Connor did not reassert her rejection of the view that all mentally retarded people lack the mental capacity to form the criminal intent necessary to impose the death penalty. O’Connor did not argue in *Atkins*, as she did in *Penry*, that a categorical ban would be overly broad. There was no examination of whether such a rule went too far to shelter mentally retarded people at all.

Instead, when the *Atkins* Court brought its own judgment to bear “by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators,”⁹¹ it focused on the wave of legislative work product that came forth after *Penry*. The Court recognized the consistency with which the state legislatures acted and examined patterns in jury sentencing, as juries consistently refused to administer the death penalty to mentally retarded defendants.⁹²

In *Atkins*, the Court determined that the only obstacle preventing a categorical ban would be determining and defining “which offenders are in fact retarded.”⁹³ The Court dealt with this problem by refusing to offer a national definition of the term “mentally retarded,” and left it up to the states to “develop appropriate ways to enforce [this] constitutional restriction upon their execution of sentences.”⁹⁴

EXAMINATION OF THE FLORIDA PROHIBITION

In 2001, the Florida legislature enacted a prohibition against executing the mentally retarded.⁹⁵ After the *Penry* decision, Florida’s new law became important for the message it sent and the national trend it marked, as the states continued to cast their vote against such practice. It is therefore appropriate to look closely at Florida Statute Section 921.137, titled “Imposition of the death sentence upon a mentally retarded defendant prohibited.”⁹⁶

⁸⁸*Id.* at 339.

⁸⁹*Id.*

⁹⁰*Penry*, 492 U.S. at 340.

⁹¹*Atkins*, 536 U.S. at 313.

⁹²*Id.* at 313-317.

⁹³*Id.* at 317.

⁹⁴*Id.*

⁹⁵FLA. STAT. ANN. § 921.137 (2002).

⁹⁶*Id.*

The first section of the statute offers definitions to terms such as “mental retardation”⁹⁷ and “significantly subaverage intellectual functioning.”⁹⁸ Although the statute does not explicitly state how low a person’s IQ must be to qualify under the term “mentally retarded,” legislative employees found that the bill would likely spare any inmate with an IQ of 70 or less.⁹⁹ As a guideline in defining degrees of severity of mental disorders, the American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders* (“DSM-IV”) states that,

an individual is mentally retarded when, prior to attaining the age of eighteen, he exhibits A) significant subaverage intellectual functioning: an IQ of approximately seventy or below on an individually administered IQ test; [and] B) concurrent deficits or impairments in present adaptive functioning . . . in at least two of the following areas: communication, self-care, home living, social interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety.¹⁰⁰

The second section of the Florida Statute, expressly states that persons found to be mentally retarded may not be sentenced to death.¹⁰¹ Sections 921.137(3) and 921.137(4) deal with procedural aspects of the prohibition.¹⁰² For example, section 921.137(3) provides that capitally charged defendants intending to raise mental retardation as a bar to the death sentence must provide notice during the penalty phase of the trial.¹⁰³ Under section 921.137(4), if a defendant has given such notice as required in 921.137(3) and subsequently received a death sentence,

⁹⁷*Id.* at § 921.137(1) (2002). Subsection 1 of Florida Statute § 921.137 explains: “As used in this section, the term ‘mental retardation’ means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18.”

⁹⁸*Id.* The same section defines “the term ‘significantly subaverage general intellectual functioning,’ for the purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Department of Children and Family Services.” *Id.*

⁹⁹Raphel, *supra* note 60, at 274 (citing ROSA ENRENREICH & JAMIE FELLNER, BEYOND REASON: THE DEATH PENALTY AND OFFENDERS WITH MENTAL RETARDATION, 13 HUM. RTS. WATCH NO. 1(G), 2 (Malcolm Smart & Cynthia Brown eds., 2001), available at <http://www.hrw.org/reports98/pbsjanjun2k1.htm>).

¹⁰⁰AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 46 (4th ed. 1994).

¹⁰¹FLA. STAT. ANN. § 921.137(2) (2002).

¹⁰²FLA. STAT. ANN. §§ 921.137(3)(4) (2002).

¹⁰³*Id.*

he may “file a motion to determine whether the defendant has mental retardation.”¹⁰⁴ The statute then requires that the court appoint “two experts in the field of mental retardation” to evaluate the defendant and advise the court of their findings.¹⁰⁵ If, after being advised, the court finds the defendant is mentally retarded, the defendant may not be sentenced to death.¹⁰⁶

The third and fourth sections of the statute essentially give the capitally charged defendant two chances of avoiding the death sentence because of his or her impaired mental capacity. When the defendant brings up his purported mental retardation at the trial level, the jury will likely be given supplemental instructions to consider mitigating circumstances in assessing whether to impose the death penalty.¹⁰⁷ In these instructions, mitigating circumstances are frequently defined to jurors as “any aspect of the defendant’s character and record or circumstances of the crime which you believe could make a death sentence inappropriate in this case.”¹⁰⁸ This allows the jury the first chance to decide whether the defendant’s diminished mental capacity reduces his personal culpability to the extent that the death penalty should not be applied. But even if the jury sentences the defendant, the defendant has a second option which allows him or her to then petition the court for an expert evaluation.¹⁰⁹

Defining “mentally retarded”

The *Atkins* Court declared a categorical ban on the execution of the mentally retarded, but it declined to prescribe a national definition for the term “mentally retarded.” While it made clear that the decision applied to all defendants that “fall within the range of mentally retarded about whom there is a national consensus,”¹¹⁰ the Court left the term “mentally retarded” to be defined by the states.¹¹¹ It stated, “[a]s with our approach in *Ford v. Wainwright* with regard to insanity, ‘we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.’”¹¹²

¹⁰⁴*Id.*

¹⁰⁵*Id.*

¹⁰⁶*Id.*

¹⁰⁷*Penry*, 294 U.S. at 309-10

¹⁰⁸*Id.* (This is a quotation from the instructions given to the jury in *Penry*.)

¹⁰⁹*Atkins*, 536 U.S. at 317.

¹¹⁰*Id.*

¹¹¹*Id.*

¹¹²*Id.*

The Importance of the DSM-IV and the AAMR Guidelines

Many states have adopted the guidelines of the DSM-IV, which is a comprehensive classification and reference manual on mental disorders, their manifestations, and treatments administered by the American Psychiatric Association.¹¹³ According to the DSM-IV,

“...the mentally retarded individual is someone who has ‘significantly subaverage general intellectual functioning’ accompanied with ‘significant limitations in adaptive functioning in at least two of the following skills areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.’”¹¹⁴

These conditions must be exhibited by the time the person reaches the age of eighteen for a person to be considered mentally retarded.¹¹⁵

The DSM-IV offers Intelligence Quotient (“IQ”) scores to characterize the term “significantly subaverage general intellectual functioning” for the purposes of defining mental retardation.¹¹⁶ Whether the defendant has the requisite limited intellectual functioning required to be clinically considered “mentally retarded” “is the pivotal component of any individual’s diagnosis.”¹¹⁷ The DSM-IV states that IQ scores of 50 to approximately 70 are indicative of persons that suffer from mild mental retardation.¹¹⁸ IQ scores of 35 to approximately 50 are indicative of persons that suffer from moderate mental retardation.¹¹⁹ IQ scores of 25 to approximately 50 are indicative of persons that suffer from severe mental retardation, and IQ scores below 25 are indicative of persons that suffer from profound

¹¹³Lyn Entzerth, *Putting the Mentally Retarded Criminal Defendant to Death: Charting the Development of a National Consensus to Exempt the Mentally Retarded from the Death Penalty*, 52 ALA. L. REV. 911, 913 (2001) (quoting AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 39 (4th ed. 1994)) [hereinafter DSM-IV].

¹¹⁴*Id.*

¹¹⁵*Id.* at 915.

¹¹⁶*Id.* at 914.

¹¹⁷James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, p.7, available at <http://www.deathpenaltyinfo.org>.

¹¹⁸*Id.* at 7.

¹¹⁹*Id.*

mental retardation.¹²⁰ “The DSM-IV notes that individuals with IQ scores in the range of seventy-one to seventy-five also may be mentally retarded if they have significant deficits in adaptive functioning.”¹²¹

While the defendant’s limited intellectual functioning is the pivotal component of the determination of whether he will be considered “mentally retarded,” there are other things in addition to a subaverage IQ score that should be considered before a person can be classified as mentally retarded.¹²² “As much as the criminal justice system might prefer to have a hard-and-fast limitation measurable by a single IQ score, it is simply impossible to exclude consideration of other factors about the testing performed on the individual, nor is it possible to ignore the need for clinical judgment by experienced diagnosticians.”¹²³ “Adaptive behavior” is one component to consider which will ensure that the individual is not merely a poor test taker, but rather is a disabled individual.¹²⁴

Another component of the defendant’s mental characterization is the “age of onset.”¹²⁵ To be considered mentally retarded, the defendant’s limited mental capacity generally must have been manifested by age 18.¹²⁶ This allows one to distinguish mental retardation from other forms of brain damage that occur later in life.¹²⁷ “This distinction is considerably more relevant to clinicians designing habilitation plans and systems of supports for an individual than it is for the criminal justice system, since later occurring disabilities . . . would involve comparable reduction in culpability for any criminal act.”¹²⁸

In addition to the DSM-IV, the other primary source of guidelines adopted by states is the American Association of Mental Retardation, which prescribes similar standards for determining mental retardation.¹²⁹ “According to the AAMR, a person is deemed mentally retarded if he or she has: (1) an IQ below 70-75, (2) concurrently existing with limitations in two or more adaptive skills areas, (3) which is manifested by age eighteen.”¹³⁰ The variations between the American Association of Mental Retardation and DSM-IV differ only

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Ellis, *supra* note 117, at 7.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 9.

¹²⁶ *Id.*

¹²⁷ Ellis, *supra* note 117, at 7.

¹²⁸ Entzeroth, *supra* note 113, at 9.

¹²⁹ *Id.* at 7.

¹³⁰ *Id.*

in semantics.¹³¹ Thus, “[i]t is important to realize that the various formulations describe the same group of individuals, and therefore do not differ in scope in any significant way.”¹³²

The Effect of *Atkins*

It is difficult to say, with any degree of accuracy, how many death row inmates *Atkins* will save from execution. Because the *Atkins* Court left “to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences,”¹³³ each state has the ability to decide whether it will use the *Atkins* decision to retroactively save mentally retarded inmates that have been sentenced to death before the categorical ban was issued. “Several of the states that had enacted statutes prior to *Atkins* included a provision that the law would only apply to prosecutions subsequent to the laws effective date. Other state laws were silent on the subject.”¹³⁴ As state legislatures enact their own statutes prohibiting the execution of mentally retarded defendants in response to *Atkins*, each state will be forced to balance the importance of executing only those who deserve such sentences with the interest of protecting themselves from the wave of law suits from death row inmates with subaverage intelligence, arguing they are mentally retarded to save themselves from execution.

CONCLUSION

Only twelve years passed between *Penry* and *Atkins*, but in that span the reaction to *Penry* was so profound that the Supreme Court reversed its ruling and categorically banned the execution of the mentally retarded. After *Penry*, there was quick action to defend the mentally retarded, primarily through state legislatures, but also through juries and opinion polls. The wave of legislative action *Penry* spawned made it clear that many people considered the mentally retarded to be a class of persons that needed to be protected from the most severe punishment administered.

Given the foregoing, it was proper for the *Penry* Court to reject the categorical ban. The Supreme Court was not in the proper position to create such a law before the state legislatures had shown the existence

¹³¹ *Id.*

¹³² Ellis, *supra* note 117, at 5.

¹³³ *Atkins*, 536 U.S. at 317 quoting *Ford v. Wainwright*, 477 U.S. 399, 405, 416-17 (1986).

¹³⁴ *Id.*

of a national consensus. The Court thus stated that it could not reach that conclusion at that time. This called for the states to speak up and take a stance with legislative actions or inactions. The enactment of legislation is perhaps the best way for the American people to voice their positions on this issue.

Further, the *Atkins* Court was right to grant certiorari when it did. It did so only after a majority of the states that had allowed the death penalty decided to discontinue that practice in a brief period of time. Given the sudden and widespread change in legislation, the Court acted appropriately in deciding that this is a punishment that the people may feel strongly opposed to, therefore the thorough examination of the issue, via *Atkins*, was appropriate. The *Atkins* decision clearly reflects the view that executing mentally retarded defendants is a practice that offends a majority of Americans, and should be categorically banned by the nation as a whole.